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May 20, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: November 8, 2004

Case No.: TIA-0314

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant

appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed at DOE's Paducah Gaseous Diffusion Plant (the plant). The Applicant worked as an engineering inspector at the plant for approximately thirty-nine years, from 1955 to 1994. The Applicant filed an application with OWA, requesting physician panel review of five illnesses - skin cancer, chronic beryllium disease (CBD), lung tumor, pituitary tumor, and heart disease.

The Physician Panel rendered a negative determination on the claimed illnesses. For the claimed skin cancer, the Panel determined that there was insufficient evidence in the record to establish that the illness was caused, contributed to, or aggravated by exposure to toxic substances while working at the plant. The Panel noted that the illness is among the most common cancers and is generally secondary to sun exposure. For the claimed CBD, the Panel stated that the Applicant's lymphocyte proliferation test results were normal and there was insufficient information to support the diagnosis of the illness. For the claimed lung tumor, the Panel determined that the Applicant's lung tumor was not related to his work at DOE. The Panel noted that the Applicant's records did not show any significant pleural plaquing or any evidence of malignancy. For the claimed pituitary tumor, the Panel determined that the condition was not caused, contributed to, or aggravated by the Applicant's work at the plant. For the claimed heart disease, the Panel determined that the illness was not related to the Applicant's work at the plant, but rather was related to the Applicant's family history of heart disease, his heavy smoking, and his history of elevated cholesterol.

The OWA accepted the Physician Panel's determinations on the claimed illnesses and the Applicant filed the instant appeal. The Applicant presented several arguments on appeal. First, the Applicant disputed

the Panel's determination on the skin cancer claim. The Applicant stated that in the early years of his employment at the plant the safety measures were inadequate and he was exposed to radiation and Cobalt 60. Second, challenging the Panel's determination on the claimed CBD, the Applicant argued that he worked with beryllium. Third, the Applicant disputed the Panel's findings regarding his lung tumor. The Applicant argued that he "worked in a heavy asbestos area for about three years." Applicant's Appeal Letter.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to, or causing the illness." *Id.* § 852.8.

The Applicant's arguments on appeal do not provide a basis for finding panel error.

First, the Applicant's discussion of his exposures to radiation and Cobalt 60 does not present a basis for finding Panel error. The Panel considered the Applicant's exposures and did not find them sufficient to have caused, contributed to, or aggravated the Applicant's skin cancer. The Applicant's argument is a mere disagreement with the Panel's medical judgment, rather than an indication of Panel error.

Second, the Applicant's assertion that he worked with beryllium does not indicate Panel error. The Panel determined that, given that the Applicant's lymphocyte proliferation test results were normal, there was insufficient documentation in the record to support a diagnosis of CBD. If the Applicant has further documentation regarding the illness that he believes will support his claim, he should contact the DOL on how to proceed.

Third, the Applicant's assertion that he worked in a "heavy asbestos area" does not present a basis for finding Panel error. The Panel determined that the condition was not related to the Applicant's employment at DOE. The Panel did not find evidence either of asbestosis or of pleural plaquing, which is a precursor to asbestosis. If the Applicant has any further documentation to support a claim for an asbestos-related lung condition, he should contact the DOL on how to proceed.

As the foregoing indicates, the appeal does not present a basis for finding panel error and, therefore, should be denied. In compliance

with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0314 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 20, 2005